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In the
Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL LYNN RICHARD
Plaintiff-Appellant
Cross Appellee

versus

THE FIRESTONE TIRE & RUBBER COMPANY
Defendant-Appellee
Cross Appellant

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RUBBER COMPANY

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72 pp

STATEMENT OF QUESTIONS PRESENTED

The Firestone Tire & Rubber Company submits the following questions:

(1) Whether the Court of Appeals' decision infringes on Firestone's Seventh Amendment right to a jury trial by not reconciling the jury's answers in its original verdict and entering a judgment thereon in favor of Firestone.

(2) Whether the Court of Appeals' decision giving the trial court the discretion to reject a decisive verdict and to consider extraneous jury answers conflicts with decisions of other Circuit Courts of Appeals.

LIST OF PARTIES TO THE PROCEEDING

The following are parties to this proceeding:

(1) Michael Lynn Richard, plaintiff-appellant, cross-appellee.

(2) Hardesty Tire Service, worker compensation intervenor who neither appealed nor appeared in the appellate proceedings.

(3) The Firestone Tire & Rubber Company, defendant-appellee, cross-appellant.

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OPINIONS BELOW

The September 7, 1988 Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 853 F.2d 1258 (5th Cir. 1988).

JURISDICTION

This Court's jurisdiction is invoked under 28 USC Sec. 1254(1) to review a decision of the Court of Appeals for the Fifth Circuit dated September 7, 1988. The Judgment of the Court of Appeals was entered on September 7, 1988. A timely filed Petition for Rehearing was denied on October 12, 1988.

Original jurisdiction of the civil action was established under 28 USC 1332(a)(1) by virtue of the diversity of the citizenship of the parties and the requisite jurisdictional amount in controversy.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this writ application is the Seventh Amendment, which provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF FACTS MATERIAL TO CONSIDERATION OF THIS WRIT APPLICATION

Plaintiff, Mr. Michael Richard, brought this product liability action to recover for injuries he received when a multi-piece truck/tire rim assembly he had inflated separated under pressure. He alleged that his injuries were caused by a defect in the design, manufacture and production of the rim and by virtue of the manufacturer's failure to warn of the dangers of the rim assembly. Defendant, The Firestone Tire & Rubber Company, was the manufacturer of the rim. Hardesty Tire Service, who paid worker compensation benefits, intervened.

After trial on the merits the case was submitted to the jury on special interrogatories on the questions of whether the rim was defective, whether, if defective, the defect caused the plaintiff's injuries, whether the plaintiff was guilty of contributory negligence, the allocation of fault and the amount of the plaintiff's damages. (Appendix pg. 26.) After lengthy deliberations the jury returned a defense verdict finding that although the rim was defective because of an inadequate warning, the defect was *not* the cause of the plaintiff's injuries. However, the jury failed to follow instructions on the verdict that it was to "go no further" if it answered "No" on the question of causation and instead went on to answer extraneous questions relevant to the plaintiff's fault or negligence, the allocation of fault (90% to the plaintiff, 10% to Firestone) and the assessment of damages. (Appendix pg. 26-29.)

The trial court stated that the answers were "improper" because the jury answered the extraneous questions and denied Firestone's motion for judgment based on the defense verdict. Over Firestone's objections the trial court advised the jury that its verdict was "not in proper

form" and returned the verdict for reconsideration. (Appendix pg. 38-44.) After further deliberations, the jury changed its answer on the causation interrogatory from "No" to "Yes" and attributed 90% contributory negligence to the plaintiff. Judgment for the plaintiff was entered on that verdict. (Appendix pg. 30-33.) Firestone's post-trial motions were denied without reasons.

The plaintiff appealed the jury's contributory negligence finding, which the Court of Appeals affirmed, and Firestone cross-appealed asserting, *inter alia*, that the trial court should have entered judgment in its favor based on the jury's original answers to the special interrogatories and erred in resubmitting the interrogatories for reconsideration. The Court of Appeals rejected Firestone's appeal and held that the trial court had the discretion both to consider the jury's extraneous answers and to resubmit them for reconsideration.

ARGUMENT

The Court of Appeals' decision violates Firestone's Seventh Amendment rights by ignoring a reasonable view of the jury's original answers that would render them consistent and capable of supporting a judgment for Firestone. The clear result of the Court of Appeals' decision is that Firestone was denied its constitutional right to trial by jury on the relevant liability issues. The protection of procedural guarantees under the Constitution is uniquely the role of the Supreme Court and this Writ should be granted to ensure those fundamental rights.

A.

The Court Of Appeals' Decision Infringes On Firestone's Right To Trial By Jury And Conflicts With Prior Decisions Of The Supreme Court By Not Reconciling The Jury's Answers

Under established product liability law a manufacturer cannot be held liable for injuries allegedly caused by its product unless a defect is found in the product *and* the defect is proven to be the legal cause of the plaintiff's injuries. *Weber v. Fidelity & Casualty Insurance Company of New York*, 259 La. 599, 250 So.2d 754, 755 (La. 1971); *Bell v. Jet Wheel Blast*, 462 So.2d 166, 168 (La. 1985); *Halphen v. Johns-Mansville*, 484 So.2d 110 (La. 1986); *Bloxom v. Bloxom*, 512 So.2d 839 (La. 1987). Therefore, based on the jury's finding that the defect in the rim was *not* the cause of the plaintiff's injuries, a judgment should have been entered in Firestone's favor in accord with the defense verdict. Instead, the jury was directed to reconsider its findings and, after further deliberations, the jury changed its answer on the issue of causation to "yes."

Firestone's appeal of the trial court's action in direct-

ing the jury to reconsider its answers was rejected by a majority of the Court of Appeals' panel. The Court never reached the question of whether the answers could in fact be reconciled. It simply erroneously "decline[d] to disturb the district court's exercise of discretion in determining that the series of answers submitted by the jury was not clear and required resubmission." (Appendix pg. 6.)

Although it has long been established that special verdicts may be resubmitted to the jury to clarify inconsistencies in its answers, *Nance v. Gulf Oil Corp.*, 817 F.2d 1176 (5th Cir. 1987); *Guidry v. Kem Manufacturing Company,* 604 F.2d 320 (5th Cir. 1979), cert. denied 445 U.S. 929, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980), the power to resubmit special interrogatories must be read in conjunction with the parties' rights under the Seventh Amendment. It is respectfully suggested that the Court of Appeals erred in not accepting a rational view of the answers on which they could be reconciled and in holding that the trial court had the "discretion" to find the jury's answers irreconcilable. Contrary to the Court of Appeals' decision the Seventh Amendment *requires* Courts to reconcile jury answers if there is any view of the jury's answers that makes them consistent:

> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, *they must be resolved that way.* For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. (Emphasis added.)

Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd, 369 U.S. 355, 364, 82 S.Ct. 780 at 786 (1962). In *Gallick v.*

Baltimore & Ohio Railroad Co., 372 U.S. 108 at 119, 83 S.Ct. 659, 666 (1963), the Court observed:

> But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798. We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889; *McVey v. Phillips Petroleum Co.*, 288 F.2d 53 (C.A. 5th Cir.); *Morris v. Pennsylvania R. Co.*, 187 F.2d 837 (C.A.2d Cir) (collecting authorities), before we are free to disregard the jury's special verdict...

The decision of the Fifth Circuit Court of Appeals to leave reconciliation of the jury's answers to the "discretion" of the trial court, and its failure to accept a rational view of the answers that renders them entirely consistent, plainly conflicts with this Court's prohibition against a "search for one possible view of the case which will make the jury's finding inconsistent...". All other circuit courts have consistently made the required attempt to reconcile the answers. For example, in *O'Brien v. Papa Gino's of America, Inc.*, 780 F.2d 1067 at 1071 (1st Cir. 1986), the First Circuit Court of Appeals held that:

> Our inquiry with respect to potentially conflicting special verdicts, however, is not whether *any possible* construction exists that would tend to show jury confusion. The Court must attempt to harmonize the jury's answers if it is possible to do

> so under a fair reading of them. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119, 83 S.Ct. 659, 666, 9 L.Ed.2d 618 (1963). (Emphasis supplied.)

And, in *Pierce v. Southern Pacific Transportation Co.*, 823 F.2d 1366 at 1370 (9th Cir. 1987), the Ninth Circuit Court of Appeals held that:

> The court has a duty to reconcile the jury's special verdict responses on *any* reasonable theory consistent with the evidence. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119-22, 83 S.Ct. 659, 666-67, 9 L.Ed.2d 618 (1983). (Emphasis added.)

Also see *Waggoner v. Mosti*, 792 F.2d 595 (6th Cir. 1986); *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986), cert. denied 107 S.Ct. 1384; *Ortiz v. Bank of America National Trust*, 824 F.2d 692 (9th Cir. 1987).

Indeed, the Court of Appeals' decision seems to be an aberration even within the Fifth Circuit itself. Prior Fifth Circuit panels have consistently mandated strict construction of jury interrogatory answers *in order to validate verdicts.* For example, in *White v. Grinfas*, 809 F.2d 1157 at 1161 (5th Cir. 1987), the Court said:

> When the jury's answers appear to conflict, we are *obliged* to reconcile the answers, if possible, in order to validate the jury's verdict. See, *e.g.*, *Federal Deposit Ins; Corp. v. Munn*, 804 F.2d 860, 867 (5th Cir. 1986); *Crossland v. Canteen Corp.*, 711 F.2d 714, 725 (5th Cir. 1983). *Indeed, this effort is required by the Seventh Amendment.* (Emphasis added.)

And in *Griffin v. Matherne*, 471 F.2d 911 at 915 (5th Cir. 1973), the Court emphasized constitutional restraints on reconciling jury answers:

> Entry of judgment upon a jury's special verdict with written findings of fact is subject not only to precedential guidelines but to a constitutional restraint as well. The Seventh Amendment requires that *if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly.* (Emphasis added.)

The *Griffin* Court established the test to be used in reconciling answers, at page 915:

> This court has stated that the test to be applied in reconciling apparent conflicts between the jury's answers is *whether the answers may fairly be said to represent a logical and probable decision* on the relevant issues as submitted, even though the form of the issue or alternative selective answers prescribed by the judge may have been the likely cause of the difficulty and largely produced the apparent conflict. (Emphasis added.)

And, in *Perricone v. Kansas City Southern Ry. Co.*, 704 F.2d 1376 (5th Cir. 1983), where it was confronted with the issue of whether a jury was properly called on to reconsider its answers, the Court expressed strong concern that resubmission of a verdict can result in something other than what was intended by the jury. The Court's concern was over the considerable risk that the jury may conclude it is being told that its original findings were unsound. This coercion, the Court said, can be communicated in "a thousand ways from a cocked eyebrow to a sideways glance",

all of which "will not be of record" and thus "are not reviewable." 704 F.2d at 1378.

The dissenting Opinion in this case likewise recognized the "dangerous ramifications in [the majority's] holding that resubmission of the verdict form to enable the jury to reconsider its answers was within the sound discretion of the trial judge." (Appendix pg. 11.) The dissent pointed out that when a completed verdict from is resubmitted to the jury the risk of a coerced verdict is substantial because the fact of the resubmission itself may communicate to the jury that the trial judge regarded its findings unjust. This, the dissenting Opinion observed, may cause the jury "not to reconcile the inconsistency but to revise the verdict in accord with its collective perception of the judge's attitude toward the case." The resulting influence, the dissent concluded, may cause the jury "to disregard its institutional role of finding the facts" and thus "the command of the seventh amendment is violated." (Appendix pg. 12-13.)

Conversely, the Court of Appeals' majority decision never reached the question of whether the jury's answers could be reconciled. It rejected Firestone's appeal on the grounds that it was "persuaded that the district court was entitled to find the answers inconsistent" and "was entitled to decline to enter judgment on the jury's findings that Firestone shared fault for an injury it did not cause". (Appendix pg. 5.) The Court of Appeals' majority decision made no finding that the jury's answers were in fact irreconcilable, and made no analysis to determine whether there was a logical view that made them consistent. It simply affirmed on the apparent presumption that the district court had found the answers irreconcilable. *In fact, the district court never found the answers irreconcilable.* No such finding was made during the jury's deliberations and no such finding was made in ruling on Firestone's post-

rial motions, which were denied without reasons. The district court said only that the answers were "improper" because extraneous questions were answered and it informed the jury that its verdict was not "in proper form." (Appendix pg. 43.) On that record the Court of Appeals' apparently presumed that the district court found the answers inconsistent and that, in the exercise of its discretion, was entitled to resubmit the interrogatories for reconsideration. Accordingly, *no court has made the requisite search to see if there is a view that makes the answers consistent.*

Although the Court of Appeals' majority decision did not make the required attempt to reconcile the jury's original answers, there clearly exists a logical view that makes them consistent and fully capable of supporting a defense judgment. As the dissenting Opinion phrased it, there is "an easily-found view" that renders them entirely consistent:

> Accordingly, there is an easily-found view of this case that the jury's allocation of fault to Firestone is entirely consistent with its finding that Firestone did not legally cause Richard's injury. The jury could have seen the fault allocation issue as asking for a comparison - in percentage terms - of the extent to which each party's behavior was substandard, or "at fault." Firestone was at fault because it had sent a product into the stream of commerce without giving warning of the dangers inherent in its foreseeable use and without instructing use of the product in a way calculated to minimize those dangers.
>
> Richard, however, was already aware of the dangers of which Firestone was under a duty to warn and of the procedures for avoiding them.

> Since he failed to follow those procedures in assembling the rim, his fault was found to be proportionately much greater than Firestone's. Furthermore, by viewing Richard's fault as a superseding cause of his own injury, the jury could consistently find no causal link between Firestone's fault - its failure to warn - and Richard's injury. (Appendix pg. 19.)

The finding that Firestone was guilty of fault could not have created confusion in the jury's clear expression on the issue of *causation* any more then did the finding of a defect in the product. Both the interrogatory that concerned *defect* and the interrogatory that concerned *fault* were unrelated to the question of whether the defect or the fault *caused* the plaintiff's injuries. It has long been established that "the consistency of the jury verdict must be considered in light of the judge's instructions to the jury." *Bates v. Jean*, 745 F.2d 1146, 1151 (7th Cir. 1984), citing *Gallick v. Baltimore & Ohio Railroad, supra*, 372 U.S. 118-22. The jury was instructed that the plaintiff must establish that the defendant engaged in substandard conduct and was thus in legal terms at "fault" and, in the next sentence, was charged that the manufacturer is liable if the plaintiff's injuries were *caused* by the defect:

> In this case the plaintiff, Michael Richard claims damages for personal injuries alleged to have been caused by a defective condition in the multipiece rim manufactured by Firestone Tire and Rubber Company. Specifically, the plaintiff alleges that while he was working on a tire and rim, which were to be remounted on a large diesel truck, the multipiece rim upon which the tire was mounted disengaged and struck the plaintiff. You are instructed as a matter of law that the plaintiff must establish by a preponderance of the evidence that the defendant has engaged in

> substandard conduct and thus in legal terms at fault. In this case involving alleged damage from a product, the basic standard applicable to the manufacturer is: the manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who, without fault on his part, sustains an injury caused by a defect in the design, composition or manufacture of the product, if the injury might reasonably have been anticipated. (Appendix pg. 34.)

The definition of causation was given later in the Court's instructions:

> As to the requirements that the plaintiff's injury be caused by the defendant's product, I don't mean that the law recognizes only one cause of any injury consisting of only one factor or thing or the conduct of only one person. On the contrary, many factors or things may operate at the same time, either independently or together, to cause injury or damage. If you find a defect, you should resolve the question of causation by deciding whether the plaintiff would probably not have suffered the claimed injuries in the absence of the defect in the defendant's product. (Appendix pg. 36-37.)

Thus, a finding of *fault* on the part of Firestone was in no way an expression that the fault *caused* the plaintiff's injuries any more that was the finding of *defect*, which the jury categorically rejected as a cause of his injuries. The finding of substandard conduct was logically nothing more than another expression of the jury's finding of a defect.

The decision of the Court of Appeals, as the dissenting Opinion suggests, allows the court to draw an "inference of proximate cause from a finding of comparative

fault." (Appendix pg. 20.) Such an inference would directly conflict with the trial court's instructions. Moreover, reliance upon inferences would allow courts to search for an *inconsistency* rather than require them to make the obligatory search for a view that renders them *consistent*.

The point that bears emphasizing is that regardless of whether there exists some view upon which it might be argued that the jury's original answers were unclear, there is nonetheless a logical view that renders them *consistent*, and that is the view that must be accepted. If the answers may fairly be said to represent a logical and probable decision on the relevant issues, they *must* be resolved that way and judgment must be entered accordingly. *Atlantic and Gulf Stevedores v. Ellerman, supra*, 369 U.S. at 364; *Gallick v. Baltimore & Ohio R.R., supra*, 372 U.S. at 119. There is no authority for leaving this determination to inferences drawn from the trial court's actions.

Furthermore, as the dissenting Opinion also points out, the established rule of law is "turned on its head" if the trial court, in its discretion, can resubmit a verdict whenever there is some view that renders the answers inconsistent, or even worse, if there is something subjective that makes the trial judge believe the jury was confused. (Appendix pg. 20.) The decision would permit a trial court to find an inconsistency not by just analyzing the *answers* themselves but by observing the jury during trial, explaining the questions to the jury and by evaluating the jury's ability to resolve uncertainties. This subjective approach to the analysis of jury answers has never been allowed and plainly invites a search for an inconsistency, which is clearly prohibited by the Seventh Amendment. *Atlantic & Gulf Stevedores v. Ellerman, supra*, 369 U.S. at 364.

The Court of Appeals' decision threatens to cloud ex-

isting law and poses a real infringement on Firestone's right to trial by jury on relevant liability issues. For these reasons Firestone requests the Court to grant a Writ of Certiorari to review the decision of the Court of Appeals.

B.

The Court Of Appeals' Decision Giving Trial Courts The Discretion To Reject Decisive Verdicts Based On Extraneous Jury Answers Conflicts With Other Circuit Court Decisions

The Court of Appeals' decision affirming the trial court's rejection of a decisive defense verdict based upon extraneous answers conflicts with a prior decision of the United States Court of Appeals for the Fourth Circuit.

In *McCollum v. Stahl*, 579 F.2d 869 (4th Cir. 1978), cert. denied 440 U.S. 912, 99 S.Ct. 1225 (1979), a case involving alleged wrongful discharge from employment, the trial court resubmitted a verdict for further consideration even though the jury's initial answers to interrogatories found no wrongful discharge conduct by the defendant. The jury found for the defendant on the critical liability issue but went on to find that the plaintiff had been maliciously discharged and assessed damages. On reconsideration the jury changed its answer on the wrongful discharge question from "no" to "yes" and a judgment for the plaintiff was entered.

On appeal, the Fourth Circuit ruled that resubmission of the interrogatories to the jury was error. Reasoning that the unequivocal finding of no wrongful conduct was a decisive verdict for the defendant, the Court of Appeals held that the answers to the subsequent interrogatories were "*surplusage, to be disregarded as no longer having place in the litigation*". 579 F.2d at 871. The Court said

that the inescapable implication of the resubmission to the jury was that the damage award demanded justification and was tantamount, in its effect, to a direction to the jury that it should find liability in order to warrant the award of damages. The Court held that the resubmission was procedurally impermissible because at the time of resubmission there was already before the Court an unequivocal finding of no wrongful conduct by the defendant, and thus a decisive verdict for the defendant.

An identical situation occurred in this case in the jury's original answers, where a decisive verdict was rendered for Firestone upon the finding that the defect did not cause the plaintiff's injuries. Furthermore, there would be no source of arguable confusion over the jury's first answers if the jury had followed the instructions on the verdict form that it "go no further" upon finding for Firestone on either the defect or causation interrogatories, and had not answered the extraneous questions, which by definition presupposed an affirmative finding on the issue of causation. The Court of Appeals concluded that the trial court enjoys "broad discretion...to *refuse* to consider interrogatories answered in violation of the court's instructions". (Emphasis added.) (Appendix pg. 6.) This analysis conflicts with the Fourth Circuit in *McCollum* because in order to find a conflict and reject the decisive defense verdict the trial court would not have *refused* to consider the improperly answered interrogatories. Rather, it would have had to *consider* the extraneous answers in order to reject the verdict. It is respectfully submitted that the Court of Appeals' interpretation, since it permits consideration of the extraneous answers in order to reject a decisive defense verdict, conflicts with the Fourth Circuit's decision in *McCollum v. Stahl, supra.*

The Court of Appeals' decision is also inexplicably in

direct conflict with another Fifth Circuit panel decision, the only other appellate decision to confront this issue. In *White v. Grinfas, supra,* the jury failed to follow the court's instructions on the verdict form and answered certain interrogatories that should not have been answered, thus making the verdict arguably inconsistent. Contrary to what happened in this case, however, the trial court in *White* entered judgment for the defendant and the plaintiff appealed, contending the answers were inconsistent. On appeal the defense judgment was affirmed on the same basis followed by the Fourth Circuit in *McCollum:*

> The problem was caused by the jury's failure to follow the court's instructions. The jury was directed not to answer any further questions if it found in question 3 that the Whites did not know of any structural defects prior to the execution of the Agreement. Because all the questions subsequent to question 3 were predicated on an affirmative response to that question, the subsequent answers had to conflict with the answer to question 3, regardless of whether they were also in conflict with each other.
>
> Thus, the real dispute is between the answer to question 3 and all other answers, rather than between the answers to questions 5 and 14. To effectuate best the intent of the jury, *we hold that if the district court has correctly found that the jury's answer to a question that was supposed to terminate further inquiry is clear and disposes of the legal issues, on review we must ignore the jury's necessarily conflicting answers to any other questions. The subsequent questions are by definition irrelevant in these circumstances, and cannot be used to impeach the jury's clear verdict.* (Emphasis added.) 579 F.2d 869.

The *White* court thus categorically rejected consideration of the questions answered in violation of the Court's instructions.

The jury's answer in this case on the causation question was clear and unambiguous, and was a decisive verdict on the liability issues that terminated further inquiry. Thus, the jury's further answers must be disregarded as surplusage in accord with *McCollum v. Stahl, supra,* 579 F.2d at 871. There is no authority for leaving to the District Court's discretion the question of whether to accept or reject a decisive defense verdict based on extraneous answers made in disregard of the Court's instructions.

The dissenting Opinion correctly points out that the Court's decision wrongly assumes that the Seventh Amendment obligation to reconcile jury answers is inapplicable when the District Court fails to reconcile them, as occurred here. (Appendix pg. 21.) The dissent also correctly points out the majority's error in finding that the trial court has any "discretion" at all to consider extraneous answers. Once a jury has disposed of the legal issues, and there is a decisive verdict, further inquiry is terminated. Any conflicting answers to any other questions are by definition irrelevant and cannot be used to impeach the jury's verdict.

As a matter of fundamental fairness, as observed in the dissenting Opinion, the "go no further" instruction is designed to protect a defendant's right to a favorable ruling on liability issues. It is designed to prevent juries from making extraneous answers to questions which, by their very nature, presuppose the existence of the requisite elements of liability. The purpose of structuring jury interrogatories in this fashion is clearly defeated by the majori-

ty Opinion because trial courts, in their discretion, would be free to disregard decisive verdicts because of those extraneous answers and return them for reconsideration under potentially coercive and prejudicial circumstances.

We respectfully suggest that the discretionary rule espoused by the Court of Appeals clearly conflicts with the Fourth Circuit's decision in *McCollum v. Stahl, supra,* and threatens to cloud established law. Litigants need an unambiguous rule that precludes the rejection of decisive verdicts because of potentially conflicting extraneous answers to special interrogatories.

CONCLUSION

The Court of Appeals' decision confronts fundamental Seventh Amendment rights and infringes upon Firestone's right to trial by jury on the relevant liability issues. It also conflicts with prior decisions of this Court and other Circuit Courts on the duties and responsibilities of the trial court in reconciling jury answers and rendering appropriate judgments on jury verdicts. The decision threatens to cloud established law and meets the important requisites for consideration by this Court. Accordingly, Firestone respectfully urges the Court to grant a Writ of Certiorari to review the decision of the Court of Appeals.

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THE FIRESTONE TIRE &
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CERTIFICATE OF SERVICE

The undersigned counsel for The Firestone Tire & Rubber Company hereby certifies that pursuant to Rule 28, three copies of this Petition for Writ of Certiorari have been served on counsel for Michael Richard by depositing same in the United States mail, postage prepaid and properly addressed, this _____ day of November, 1988, as follows:

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_____

William J. Hamlin

APPENDIX A

Michael Lynn RICHARD,
Plaintiff-Appellant,
Cross-Appellee,

v.

The FIRESTONE TIRE & RUBBER CO., Defendant-Appellee, Cross-Appellee,

v.

HARDESTY TIRE REPAIR,
Intervenor-Appellee.
No. 87-4815.

United States Court of Appeals,
Fifth Circuit.

Sept. 7, 1988.

Tire installer who was injured when tire exploded as he prepared to mount it on a truck axle brought suit against manufacturer of tire rim. The United States District Court for the Western District of Louisiana, Donald E. Walter, J., entered judgment on a jury verdict finding that rim was defective because manufacturer failed to warn of its dangers, but that installer was 90% at fault, and reducing award accordingly. Plaintiff appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) initial jury verdict was inconsistent, justifying district court's decision to retire jury for further deliberations; (2) evidence supported jury's finding that manufacturer failed to warn adequately of dangers of use of its product and that such failure was causally related to plaintiff's injury; (3) evidence supported jury's finding that plaintiff was 90% at fault for accident; and (4) under Louisiana products liability law, comparative negligence can apply to a failure to warn case.

Affirmed.

Jerry E. Smith, Circuit Judge, concurred in part and dissented in part with opinion.

1. Federal Civil Procedure ⇐ 2217

Verdict in product liability case was inconsistent, where jury answered interrogatory finding no causation between defect and injury, but in another interrogatory, assigned 10% of the fault for the injury to manufacturer, and thus district court properly retired jury for further deliberations.

2. Products Liability ⇐ 83.5

Evidence supported jury finding in products liability case arising from explosive separation of tire rim from tire that manufacturer failed to warn adequately about the danger that even a slight misalignment between rim and side ring might cause explosive rim separation; plaintiff's expert testified that slight out-of-roundness of rim could combine with slightly warped side ring to prevent ring from seating properly, even without obvious misassembly, and that failure to seat could cause tire bead to hang up on side ring's edge during inflation, creating a potential for explosive rim separation.

3. Products Liability ⇐ 83.5

Evidence in products liability action arising from explosive separation of tire rim from tire supported jury's finding that plaintiff was 90% at fault for accident; plaintiff in his deposition testimony said that his boss had told him to mount tires before inflating them, or to mount after inflating them with just a few pounds of air, had plaintiff followed either precedure, he would not have been standing directly in side ring's trajectory while mounting fully inflated, and therefore more dangerous, tire.

4. Products Liability ⇐ 40

Under Louisiana products liability law, comparative

negligence applied to failure to warn case arising from explosive separation of tire from tire rim; application of comparative negligence would realistically promote safer product use, considering that plaintiff hurried through assembly and inflation of tire, ignoring his boss' instructions to mount tire before fully inflating it; moreover, application of principle would not drastically reduce manufacturer's incentive to make safer tire rims because manufacturer could not reasonably rely on careless use by future plaintiffs to reduce its economic liability.

Appeal from the United States District Court For the Western District of Louisiana.

Before GEE, DAVIS and SMITH, Circuit Judges:

W. EUGENE DAVIS, Circuit Judge:

Both parties to this product liability action are disappointed with the verdict rendered in this case and appeal. The suit followed Richard's injury that occurred when a Firestone tire rim separated while he was mounting the tire on a truck. Firestone complains of the jury finding that it failed to warn of danger to workmen assembling or mounting tires equipped with its multi-piece rims. Richard complains of the reduction in his award based on the jury's finding that his fault was ninety percent responsible for the accident. We find no error and affirm.

I.

On the day of the accident, Richard, an employee of Hardesty Tire Service, responded to a call from Louisiana Metals Company to fix four flat tires. He fixed three tires without incident but suffered serious injury while working on the fourth, a tire equipped with a Firestone two-piece

rim. Richard had repaired the flat, reassembled the tire rim, and inflated the tire with seventy-five pounds of air. The tire exploded as Richard prepared to mount it on a truck axle; the rim's side ring separated from the rim and struck him in the forehead.

Richard sued Firestone and Louisiana Metals Co., Inc., in Louisiana state court. He alleged that defects in the design, manufacture, and production of Firestone's rim, along with Firestone's failure to warn users about the danger of its two-piece rim, caused his injuries. At Firestone's motion, the action was removed to federal district where the case was tried to a jury.

After the jury returned what the district court considered to be an inconsistent verdict, the court directed the jury to retire for further deliberation. The jury found the rim defective because Firestone failed to warn of its dangers and assessed Richard's damages at $629,000. However, the jury also found Richard ninety percent at fault, and his award was reduced accordingly. This appeal followed the district court's denial of all post trial motions.

II.

[1] Firestone's first ground for appeal focuses on the district court's decision to retire the jury for further deliberations after the jury initially returned its verdict. Interrogatory 1(a) asked whether Firestone's rim was defective, and 1(b) asked if the defect caused Richard's injury. The court's special verdict form instructed the jury to "go no further" if it answered "no" to 1(a) or 1(b). Initially, the jury answered "yes" to 1(a) and "no" to 1(b); however, it

also answered the questions that followed 1(b).[1] The court found the verdict inconsistent, denied Firestone's motion for judgment on the jury's initial answers to the special interrogatories, and directed the jury to consider further its answers. During these deliberations the jury changed its 1(b) answer to "yes".

Courts are obligated to reconcile a jury's answers when possible. *White v. Grinfas,* 809 F.2d 1157, 1161 (5th Cir. 1987). Predicated on this fundamental rule, Firestone labors to explain how the jury's first answer to interrogatory 1(b) finding no causation between the defect and Richard's injury does not contradict the jury's response to Interrogatory 4, in which it assigned ten percent of the fault for Richard's injury to Firestone. We are persuaded that the district court was entitled to find these answers inconsistent. It was entitled to decline to enter judgment on the jury's findings that Firestone shares fault for an injury it did not cause.

Relying on *White* again, Firestone further argues that the district court should have ignored the answers to the interrogatories that followed interrogatory 1(b) and entered judgment for Firestone when the jury found no causation linking the defect in defendant's product to plaintiff's injury. In *White,* as in this case, the jury answered Special Issue 3 "We do not" when asked if it found that the defendants in that suit for fraud and breach of implied warranty knew the apartments they were selling had structural defects. It then ignored the court's instructions to refrain from answering the remaining questions once it answered no to this question. In answer to the remaining special issues the jury determined, inconsistent

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[1] The jury went on to find the Firestone rim defective based on its failure to warn; apportion Firestone's fault at ten percent and Richard's at ninety percent; and assess Richard's damages at $629,000.

with its earlier answer, that the defendants had knowingly withheld structural information to induce the plaintiffs into entering a contract. The district court entered judgment for defendants predicated on the jury's answer to Special Issue 3. In affirming, we concluded that "if the district court has correctly found that the jury's answer to a question that was supposed to terminate further inquiry is clear and disposes of the legal issues, on review we must ignore the jury's necessarily conflicting answers to any other questions." *White*, 809 F.2d at 1161. Thus, in *White* we recognized the broad discretion the district court enjoys to refuse to consider interrogatories answered in violation of the court's instructions.

We have consistently given the district court wide discretion in deciding whether the jury's answers to the court's questions are clear. See *Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1178 (5th Cir. 1987); *Landry v. Offshore Logistics, Inc.*, 544 F.2d 757, 761 (5th Cir. 1977). As we noted in *Nance*, "[m]ere resubmission does not necessarily coerce a verdict." *Nance*, 817 F.2d at 1178.

Moreover, Fed.R.Civ.P. 49(b), which permits the trial court to resubmit inconsistent answers to interrogatories that accompany a general verdict, and our reading of Fed.R.Civ.P. 49(a) to allow resubmission of inconsistent special verdicts, underscore the scope of this decretion. See *Nance*, 817 F.2d at 1178; *Perricone v. Kansas City Ry. Co.*, 704 F.2d 1376, 1379 (5th Cir. 1983); *Guidry v. Kem Mfg. Co.*, 604 F.2d 320, 321 (5th Cir. 1979), *cert. denied*, 445 U.S. 929, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980). The district judge, who has observed the jury during the trial, prepared the questions and explained them to the jury, is in the best position to determine whether the answers reflect confusion or uncertainty. The jury also is in an excellant position

to resolve this uncertainty with proper guidance. See *Geosearch, Inc. v. Howell Petroleum Corp.*, 819 F.2d 521, 527 (5th Cir. 1987); *McVey v. Phillips Petroleum Co.*, 288 F.2d 53, 59 (5th Cir. 1961). Removing any uncertainty in the jury's findings obviously solidifies any judgment entered on the verdict and reduces the prospect of the dreaded retrial. We decline to disturb the district court's exercise of discretion in determining that the series of answers submitted by this jury was not clear and required resubmission.

III.

[2] Firestone also argues that the record evidence does not support the jury's findings that it failed to warn adequately of the dangers of the use of its product and that such failure was causally related to Richard's injury. We conclude that substantial evidence supports this finding. See *Eyre v. McDonough Power Equip., Inc.*, 755 F.2d 416, 419-20 (5th Cir. 1985).

Under Louisiana law, a manufacturer is strictly liable if the product left the manufacturer's control in an unreasonably dangerous condition and the condition is the legal cause of plaintiff's injuries. *Bell v. Jet Wheel Blast*, 462 So.2d 166, 168 (La. 1985). Unreasonably dangerous conditions include the manufacturer's failure to provide adequate warning of dangers inherent in the product's normal use, if not within the knowledge of or obvious to the user. *Bloxom v. Bloxom*, 512 So.2d 839, 843 (La. 1987); *Halphen v. Johns-Manville Sales Corp.*, 484 So.2d 110, 115 (La. 1986). A manufacturer may be liable if it fails to tell users how to avoid the product's inherent dangers. *Guidry v. Kem Mfg. Co.*, 693 F.2d 426, 430 (5th Cir. 1982).

Firestone insists that it breached no duty to warn, given that Richard knew to check rims for obvious

misassembly before inflation because improperly assembled tires could explode. It points to Richard's testimony that he had three months of on-the-job training in truck tire repair, knew the importance of avoiding damaged pieces, and knew to clean rim pieces before assembly to insure proper fit. The testimony of Richard Hardesty, Richard's boss, corroborated this information.

However, the jury was entitled to believe the testimony of Richard's expert, Dr. Hugh A. Walls. He testified that slight out-of-roundness of the rim could combine with a slightly warped side ring to prevent the ring from seating properly, even without obvious misassembly. He further testified that this failure to seat could cause the tire bead to hang up on the side ring's edge during inflation, creating a potential for explosive rim separation. This paralleled the testimony of Richard and another eyewitness that the side ring appeared to be seated properly in the rim before the tire exploded.

Further, Richard and his employer testified that they received no warnings or instructions on two-piece rim assembly from Firestone. The record does not indicate that Richard knew to check for slight warping in the ring or out-of-roundness of the rim. Thus, the jury was entitled to conclude that Firestone failed to provide a particularized warning about the danger of even a slight misalignment between rim and side ring that was not noticeable at all or barely noticeable. In so doing, the jury was free to reject the testimony of Firestone's experts that, based on computer simulations and engineering principles, only a gross and obvious misalignment could precede such an accident.

[3] For his part, Richard also argues that insufficient evidence supports the jury's finding that he was ninety percent at fault for this accident. We disagree. During cross-

examination, Firestone's attorney led Richard through prior sworn deposition testimony indicating that Richard, anxious to finish work at the end of a hot day, did not follow all of his boss's instructions.

Richard testified at trial that he had inflated the tire fully and was preparing to mount it on the axle when the ring separated. However, in his deposition testimony Richard said his boss had told him to mount tires before inflating them, or to mount them after inflating them with just a few pounds of air. Had he followed either procedure, Richard would not have been standing directly in the ring's trajectory while mounting the fully inflated—and therefore more dangerous—tire. In his deposition, Richard also testified that at times he had followed these procedures before the accident. Thus, the jury was entitled to find that Richard's conduct was the predominant cause of his accident.

IV.

[4] These findings bring us to the novel issue of whether comparative negligence can apply to a failure to warn case under Louisiana products liability law. We conclude that it does apply.

We start with the Louisiana Supreme Court's guidelines for application of comparative negligence to products liability actions in *Bell v. Jet Wheel Blast*, 462 So.2d 166, 171 (La.1985). Under *Bell*, comparative negligence should apply to liability based on failure to warn if it would (1) realistically promote safer product use, and (2) not drastically reduce the manufacturer's incentive to make safer products. *Id.* at 171-72. A careful reading of the case-law suggests that application of comparative negligence here satisfies both prongs.

In *Bell*, the Louisiana Supreme Court relied on prong

one in refusing to apply comparative negligence to an employee who caught his hand in the chain-and-sprocket drive of a conveyor belt that lacked an adequate guard. *Id.* at 172. The court reasoned that "the application of comparative fault would not serve to provide any greater incentive to an employee to guard against momentary neglect or inattention so as to prevent his hand from being mangled by machinery." *Id.*

We relied on the *Bell* court's reasoning in concluding that comparative negligence applied to the plaintiff in *Winston v. International Harvester Corp.*, 791 F.2d 430, 433-34 (5th Cir.1986), who was injured when he fell from his tractor after it left the road. We concluded that application of comparative negligence to *Winston's* facts would promote safer product use. Unlike the plaintiff in *Bell*, Winston's negligence in steering his tractor off the road "'amounted to more than 'simple inadvertance' or 'momentary neglect.'" *Winston*, 791 F.2d at 434.

Under this reasoning, comparative negligence would promote safer product use in Richard's situation. The jury apparently believed that Richard hurried through assembly and inflation of the tire, ignoring his boss's instructions to mount the tire before fully inflating it. Thus, this is not a situation in which Richard simply looked away at a crucial moment or fell victim to some other form of "momentary neglect."

The *Bell* test's second prong also supports application of comparative negligence in this case. As we stated in *Winston*, this principle will not drastically reduce Firestone's incentive to make safer tire rims because Firestone "'cannot reasonably rely on careless use by future plaintiffs to reduce its economic liability.'" *Winston*, 791 F.2d at 434 (quoting *Nicholas v. Homelite Corp.*, 780

F.2d 1150, 1154 (5th Cir. 1986). The rule's promotion of safer consumer use reinforces this conclusion; it reduces further the likelihood that Firestone can limit its liability in future cases by pointing to careless consumer conduct. Thus, we are satisfied that application of comparative negligence in this case is proper because it satisfies both prongs of the *Bell* test.[2]

AFFIRMED.

JERRY E. SMITH, Circuit Judge, concurring in part and dissenting in part:

I fully concur in Parts III and IV of the majority's opinion holding that the evidence supports the verdict and that comparative negligence is applicable to the facts of this case under Louisiana law. However, I respectfully dissent from Part II of the opinion. There are dangerous ramifications in its holding that resubmission of the verdict form to enable the jury to reconsider its answers was within the sound discretion of the trial judge. Believing that the answers were reconcilable as a defense verdict, and that the seventh amendment mandates their reconciliation as such, I would reverse and render judgment for the defendant without reaching whether comparative negligence is applicable here.

I.

The seventh amendment guarantees the right to a jury fact-finding in civil trials. When the right has been invoked, the trial judge's formal role in the fact-finding pro-

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[2] We also have considered Richard's contention that the trial court's instruction on normal use was erroneous.Because Richard did not object to the charge he did not preserve this point for appeal.

cedure is reduced to the largely ministerial task of delivering the charge, which assists and guides the jury. At this stage in the trial, however, the potential for the judge to exert subliminal, informal influence on the jury is great. The ceremony of trial has socialized the jury to defer to the Solomon-wise majesty of the trial judge as an impartial dispenser of justice. As we recently noted,

> [t]he trial judge is a potent figure indeed. His instructions are lethal. He can communicate his attitude in a thousand ways from a cocked eyebrow to a sideways glance. Those will not be of record. They are not reviewable. Trial judges are disciplined ultimately only by their good faith and integrity and by an occasional reminder from their appellate brethren to be constantly vigilant of their power.

Perricone v. Kansas City S. Ry., 704 F.2d 1376, 1378-79 (5th Cir. 1983).

When a trial judge resubmits the completed verdict form to the jury because its answers to the special interrogatories appear inconsistent, the risk of a coerced verdict is substantial, even though the record may be unreflective of anything suggestive in the manner of resubmission. The fact of the resubmission itself may very well communicate to the jury that the trial judge regarded its findings unjust. The jury may then act not to reconcile the inconsistency but to revise the verdict in accord with its collective perception of the judge's attitude toward the case.

The resubmission may also communicate to the jury the legal effect of its answers and thus facilitate any impulse it may have to "do justice" in the case. Of course, to the extent the jury is moved by such influences to disregard its institutional role of finding the facts on the

basis of the evidence presented at trial, the command of the seventh amendment is violated.

Although our circuit has long recognized that inconsistent special verdict answers may be resubmitted for jury reconciliation, we nonetheless have stated that the seventh amendment "should not normally justify 'reconsideration' of those answers . . ." *Perricone*, 704 F.2d at 1379. Until today, we have never afforded a trial court "wide discretion" to decide whether the answers are in fact inconsistent. Rather, the resubmission procedure has been hedged in prophylactic safeguards, precisely because of the difficulty of detecting a violation in the record, and we have always viewed resubmission as proper only in certain exceptional circumstances: "[T]he Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly." *Id.* (quoting *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973)). *See also Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1178 (5th Cir. 1987).

Our standard for reviewing a trial court's resubmission of a special verdict has evolved as a logical analogue to our more well-refined standard for reviewing a judgment entered upon a verdict claimed on appeal to be irreconcilably inconsistent. Both classes of cases share the same premise that the seventh amendment right to a jury trial subsumes the right to a reconcilable verdict and both classes of cases have employed the same test for determining whether jury answers to special verdicts are inconsistent:

> This court has stated that the test to be applied in reconciling apparent conflicts between the jury's answers is whether the answers may fairly be said to represent a logical and probable deci-

> sion on the relevant issues as submitted, even though the form of the issue or alternative selective answers prescribed by the judge may have been the likely cause of the difficulty and largely produced the apparent conflict.

Griffin v. Matherne, 471 F.2d at 915.[1]

In applying this test, we have acknowledged a constitutional requirement "to make a concerted effort to reconcile apparent inconsistencies if at all possible." *Mercer v. Long Mfg. N. C., Inc.*, 665 F.2d 61, 65 (5th Cir.1982) (citing *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798 (1962), and *Griffin v. Matherne*). If reconciliation is possible, then it is reversible error for a trial court to have entered judgment on a resubmitted verdict. *See McCollum v. Stahl*, 579 F.2d 869, 870-71 (4th Cir.1978), *cert. denied*, 440 U.S. 912, 99 S.Ct. 1225, 59 L.Ed.2d 460 (1979) (construed and approved in *Perricone*, 704 F.2d at 1380).[2]

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[1] Judge Godbold's opinion in *Griffin v. Matherne* is the leading case in this circuit for determining whether judgment has been improperly entered on an inconsistent verdict. For resubmission cases quoting the *Griffin* test as set out above, *see Perricone*, 704 F.2d at 1379; *Fugitt v. Jones*, 549 F.2d 1001, 1005 (5th Cir.1977).

[2] Before today, the only case from our circuit to review a trial court's decision to resubmit a verdict form containing answers not legally inconsistent was *Perricone v. Kansas City S.Ry.* There, we flatly rejected affording the trial court discretion in such circumstances, 704 F.2d at 1379 (distinguishing *Morrison v. Frito-Lay, Inc.*, 546 F.2d 154 (5th Cir.1977), and held that the defendant had a constitutional right to the verdict as returned after the original submission. *Id.* at 1380. The defendant, however, was held to have waived that right by failing to object contemporaneously to the resubmission. My review of the record in the instant case reveals that Firestone entered a timely objection and requested the judge to enter judgment on the original verdict.

The basic question in the instant case, then, is whether it is possible to create a consistency between the answers contained in the verdict before the trial court resubmitted it. This case went to the jury on the following questions and reappeared the first time with the following responses:

Interrogatory No. 1:

Has plaintiff, Michael Lynn Richard, established by a preponderance of the evidence:

a) That the Firestone multipiece rim was defective?
Yes X No__

b) That the injury plaintiff suffered was caused by a defective condition in Firestone's rim and such injury might reasonably have been anticipated by the manufacturer?
Yes__ No X

(footnote 2 continued)

Authorities cited by the majority are not to the contrary. In *Nance v. Gulf Oil Co.*, we did not defer to the trial court's discretion to determine the existence of an inconsistency. Rather, we ourselves attempted to reconcile the verdict, concluding that "our imagination does not stretch so far as to harmonize the findings that Gulf was neither negligent nor strictly liable with the finding rendered against Gulf on the issue of comparative fault. *Because* the answers in the first verdict were *irreconcilable*, there was no seventh amendment violation by the resubmission of the verdict form." 817 F.2d at 1178 (emphasis added). Likewise in *Landry v. Offshore Logistics, Inc.*, 544 F.2d 757, 761 (5th Cir.1977), resubmission was proper because the inconsistency was irreconcilable: The jury both had found the plaintiff not contributorily negligent and, in a subsequent issue, had assessed the degree of his contributory negligence at 75%. Further, as in *Perricone*, the defendant made no objection when the jury was sent back for further deliberations. *Id.*

c) There was actual damage to plaintiff's person?

Yes X No __

If your answer to A or B is "No" go no further.

If your answer to A and B is "Yes" then you must answer one or more of Interrogatory No. 2 a-d "Yes".

Interrogatory No. 2:

a) Is the Firestone multipiece rim assembly defective because the risk of hazards of the product outweighs the utility of the product?

Yes __ No X

b) Is the Firestone multipiece rim assembly defective in design because alternative products were available to serve the same needs with less risk of harm?

Yes __ No X

c) Is the Firestone multipiece assembly defective because there was a feasible way to design the product with less harmful consequences?

Yes __ No X

d) Is the Firestone multipiece rim assembly defective because Firestone failed to adequately warn about the dangers of the product and the methods of avoiding those dangers?

Yes X No __

Interrogatory No. 3:

Was the fault or negligence of the plaintiff, Michael Lynn Richard, a cause of his injury?

Yes X No __

Interrogatory No. 4:

Express in terms of a percent, the degree of the parties' fault or negligence.

Plaintiff	90%
Defendant	10%
Total	100%

(Note, the percentages above must total 100%).

Interrogatory No. 5:

In terms of dollars, without reducing this damage figure by any percentage of negligence of which you may have found plaintiff guilty, how much in total damages did the plaintiff sustain as a result of the accident?

a) Injury, pain, disability, disfigurement, loss of capacity for enjoyment of life.

$150,000

b) Medical expenses.

$200,000

c) Lost earnings, lost earning capacity.

$279,000

(Fill in each blank with a dollar amount or with a "O" if you find no damages for a particular category.)

Manifestly, the jury found that the rim was defective (Interrogatory 1(a)) but that Richard's injury was not proximately caused by the defect (Interrogatory 1(b)). Disregarding its instruction not to proceed further if it found either no defect or no proximate cause, the jury went on to express the degree of Firestone's fault in terms of a ten percent figure (Interrogatory 4).

Whether resubmission was proper, then, depends upon whether it is possible to reconcile a finding of comparative fault with a finding of no proximate cause. Stated alternatively, does a finding of comparative fault necessarily imply a finding of proximate cause? If if does not, then the trial court should have entered judgment exonerating Firestone on the first set of answers.

In attempting to reconcile special verdicts, the court must also look to the instructions given the jury therein. *Griffin, supra; Mercer, supra.* As to the definition of "fault," the trial judge instructed the jury that "the plaintiff must establish by a preponderance of the evidence that the defendant has engaged in sub-standard conduct and is thus, in legal terms, 'at fault'". Fault, therefore, as defined in the instruction, does not contain a causation component. Fault simply equates to sub-standard behavior, which may or may not have been the legal cause of plaintiff's injury.[3]

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[3] It is not unusual for a defendant to be found negligent, because of substandard behavior, but to be completely exonerated because its negligence was not the cause of the plaintiff's injury. In *Cooper v. Marriott Corp.*, 851 F.2d 1419 (5th Cir.1988) (per curiam), for example, the plaintiff sued a hotel for injuries he sustained as a result of an assault in the hotel's parking garage. The jury concluded that the hotel was negligent in that its security system was inadequate. But it also

The conceptual separation of fault and causation is further borne out by the logical structure of Interrogatory No. 3, which expressly assumes Richard's fault and then questions the jury as to whether such fault was the cause of Richard's injury.

Accordingly, there is an easily-found view of this case that the jury's allocation of fault to Firestone is entirely consistent with its finding that Firestone did not legally cause Richard's injury. The jury could have seen the fault allocation issue as asking for a comparison—in percentage terms—of the extent to which each party's behavior was substandard, or "at fault." Firestone was at fault because it had sent a product into the stream of commerce without giving warning of the dangers inherent in its foreseeable use and without instructing use of the product in a way calculated to minimize those dangers.

Richard, however, was already aware of the dangers of which Firestone was under a duty to warn and of the procedures for avoiding them. Since he failed to follow those procedures in assembling the rim, his fault was found to be proportionately much greater than Firestone's. Furthermore, by viewing Richard's fault as a superseding cause of his own injury, the jury could consistently find no causal link between Firestone's fault—its failure to warn—and Richard's injury.

(Footnote 3 continued)
answered that such negligence was not the cause of plaintiff's injury, based upon the hotel's assertion that because of the quickness of the attack and plaintiff's proximity to an entrance, even adequate security measures would not have prevented the attack. Rejecting plaintiff's argument that the jury's answers were inconsistent, we affirmed the judgment rendered in favor of the hotel.

The majority holds that the trial court acted within its discretion in drawing the *permissible* inference of proximate cause from a finding of comparative fault. In effect, the court is retreating from its previous recognition of a seventh amendment right to judgment on a verdict where there is "some view of the case that makes the jury's answers consistent." *Nance*, 817 F.2d at 1178.

This rule is turned on its head by affording the trial judge "wide discretion" to resubmit a verdict whenever, instead, there is some view of the case that makes the jury's answers *inconsistent*, or even worse, when something about the jury's answers alerts the trial judge to the possibility that the jury might have been confused in rendering its verdict. Although I am in full agreement with the majority that the trial judge is in a much better position than we to evaluate whether the answers reflect confusion or uncertainty, I believe, as I have pointed out, that the potential for off-the-record interference with the jury's constitutional function is too great to permit the type of free-wheeling procedure which the majority today endorses.

II.

Additionally, as a second, independent ground for reversing and rendering judgment on the jury's first verdict, I would hold that anytime an inconsistency is created by a jury response given in violation of a proceed-no-further instruction, that response should be treated as mere surplusage and disregarded. The proceed-no-further instruction should protect a defendant's right to a favorable finding on a liability issue by preventing juries from inconsistently answering apportionment or damage issues that have been structured to assume the existence of the requisite elements of libility. *See White v. Grinfas*, 809

F.2d 1157 (5th Cir.1987).[4]

To resubmit the verdict after the jury has disregarded the court's instruction is unfair to the defendant. If, for example, the jury is unaware of the legal effect of its answers at the time of first submission but is predisposed to award the plaintiff damages, then there is always a substantial possibility, so long as the jury remains uninformed, that it will answer a liability issue favorably to the defendant. Afterwards, it may create an "inconsistency" by answering an issue that requires it to state the amount of damages necessary to compensate the plaintiff for the defendant's actionable conduct.

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[4] In *White*, we confronted a judgment which, appellant contended, had been entered on the basis of irreconcilable answers to special interrogatories. The problem was caused by the jury's failure to abide by a proceed-no-further instruction. This instruction directed the jury not to answer further questions if it found that the counterclaim-defendants did not know of structural defects they had allegedly concealed. Because all questions subsequent to Question 3 were predicated on an affirmative response to that question—and thus, expressly assumed that the counterclaim-defendants had possessed culpable knowledge—the subsequent answers necessarily conflicted with Question 3.

Acknowledging our seventh amendment duty "to reconcile the answers, if possible, in order to validate the jury's *verdict*" (not the lower court's judgment), we devised a rule "[t]o effectuate best the intent of the jury": "[i]f the district court has correctly found that the jury's answer to a question that was supposed to terminate further inquiry is clear and disposes of legal issues, on review we must ignore the jury's necessarily conflicting answers to other questions." *Id.* at 1161 (emphasis added).

From this premise, the majority concludes that "in *White* we recognized the broad discretion the district court enjoys to refuse to consider interrogatories answered in violation of the court's instructions." This conclusion is erroneous, however, because it wrongly assumes that our seventh amendment obligation to reconcile jury answers whenever possible does not apply with equal force when the district court does not reconcile them. Moreover, I find nothing in *White* to indicate that a district court has discretion to consider extraneous answers returned by a jury in violation of a proceed-no-further instruction.

When the inconsistent verdict is then resubmitted with renewed emphasis by the judge that damages cannot be assessed unless the jury "reconsiders" its answer on the liability issue, the risk of an informed sympathy verdict is great. This risk should not fall on the defendant when the jury creates an inconsistency in violation of the court's instructions. In other words, it is wrong to reward one party (in this case, the plaintiff) and penalize the other party (in this case, the defendant) for the sole reason that the jury disobeyed the clear instructions given by the court.

For the foregoing reasons, I would reverse and render judgment for the defendant.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
Oct 12 1988

No. 87-4815

MICHAEL LYNN RICHARD,
Plaintiff-Appellant-
Cross-Appellee,

versus

THE FIRESTONE TIRE & RUBBER CO.,
Defendant-Appellee-
Cross-Appellant,

versus

HARDESTY TIRE REPAIR,
Intervenor-Appellee.

Appeals from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

(Opinion SEPTEMBER 7, 1988,
5 Cir., 198__, _____F.2d____)

Before GEE, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

Filed
Sep 28 1987

MICHAEL LYNN RICHARD,

versus

CIVIL ACTION NO. 86-0046

FIRESTONE TIRE & RUBBER CO.,

JUDGMENT

IT IS ORDERED, ADJUDGED and DECREED that judgment is entered in favor of plaintiff, Michael Lynn Richard, and against defendant, Firestone Tire & Rubber Co. in the amount of $62,900 plus interest from date of judicial demand until paid; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that judgment is entered in favor of intervenor, Hardesty Tire Repair, in the amount of $4,226.54 against plaintiff, Michael Lynn Richard, plus judicial interest from the date of intervention until paid.

THUS DONE AND SIGNED at Monroe, Louisiana, this 28th day of September, 1987.

/s/ Donald E. Walter

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

Judgment Entered 9-29-87

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

MICHAEL LYNN RICHARD	:	
	:	
VERSUS	:	CIVIL ACTION
	:	No. 86-0046-LC
FIRESTONE TIRE &	:	
RUBBER COMPANY, ET AL	:	

INTERROGATORIES TO JURY

Interrogatory No. 1:

Has plaintiff, Michael Lynn Richard, established by a preponderance of the evidence:

a) That the Firestone multipiece rim was defective?

Yes ✓ No _____

b) That the injury plaintiff suffered was caused by a defective condition in Firestone's rim and such injury might reasonably have been anticipated by the manufacturer?

Yes _____ No ✓

c) There was actual damage to plaintiff's person?

Yes ✓ No _____

If your answer to A or B is "No" go no further.

If your answer to A and B is "Yes" then you must answer one or more of Interrogatory No. 2 a - d "Yes."

Interrogatory No. 2:

a) Is the Firestone multipiece rim assembly defective because the risk of hazards of the product outweighs the utility of the product?

Yes _____ No ✓

b) Is the Firestone multipiece rim assembly defective in design because alternative products were available to serve the same needs with less risk of harm?

Yes _____ No ✓

c) Is the Firestone multipiece assembly defective because there was a feasible way to design the product with less harmful consequences?

Yes _____ No ✓

d) Is the Firestone multipiece rim assembly defective because Firestone failed to adequately warn about the dangers of the product and the methods of avoiding those dangers?

Yes ✓ No _____

Interrogatory No. 3:

Was the fault or negligence of the plaintiff, Michael Lynn Richard, a cause of his injury?

Yes ✓ No _____

(If your answer to Interrogatory No. 3 is "No", go to Interrogatory No. 5).

Interrogatory No. 4:

Express, in terms of a percent, the degree of the parties' fault or negligence.

Plaintiff	90	%
Defendant	10	%
Total	100	%

(Note, the percentages above must total 100%).

Interrogatory No. 5:

In terms of dollars, *without* reducing this damage figure by any percentage of negligence of which you may have found plaintiff guilty, how much in total damages did the plaintiff sustain as a result of the accidnent[sic]?

a) Injury, pain, disability, disfigurement, loss of capacity for enjoyment of life.

$150,000

b) Medical expenses.

$200,000

c) Lost earnings, lost earning capacity.

$279,000

(Fill in each blank with a dollar amount or with a "0" if you find no damages for a particular category).

Lake Charles, Louisiana this 22nd day of September, 1987.

/s/ Carol A. Hess

FOREPERSON

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Filed
Sep 22, 1987

MICHAEL LYNN RICHARD	:	
	:	
VERSUS	:	CIVIL ACTION
	:	No. 86-0046-LC
FIRESTONE TIRE &	:	
RUBBER COMPANY, ET AL	:	

INTERROGATORIES TO JURY

Interrogatory No. 1:

Has plaintiff, Michael Lynn Richard, established by a preponderance of the evidence:

a) That the Firestone multipiece rim was defective?

Yes ✓ No _____

b) That the injury plaintiff suffered was caused by a defective condition in Firestone's rim and such injury might reasonably have been anticipated by the manufacturer?

Yes ✓ No _____

c) There was actual damage to plaintiff's person?

Yes ✓ No _____

If your answer to A or B is "No" go no further.

If your answer to A and B is "Yes" then you must answer one or more of Interrogatory No. 2 a - d "Yes."

Interrogatory No. 2:

a) Is the Firestone multipiece rim assembly defective because the risk of hazards of the product outweighs the utility of the product?

Yes _____ No ✓

b) Is the Firestone multipiece rim assembly defective in design because alternative products were available to serve the same needs with less risk of harm?

Yes _____ No ✓

c) Is the Firestone multipiece assembly defective because there was a feasible way to design the product with less harmful consequences?

Yes _____ No ✓

d) Is the Firestone multipiece rim assembly defective because Firestone failed to adequately warn about the dangers of the product and the methods of avoiding those dangers?

Yes ✓ No _____

Interrogatory No. 3:

Was the fault or negligence of the plaintiff, Michael Lynn Richard, a cause of his injury?

Yes ___✓___ No _____

(If your answer to Interrogatory No. 3 is "No", go to Interrogatory No. 5).

Interrogatory No. 4:

Express, in terms of a percent, the degree of the parties' fault or negligence.

Plaintiff	90	%
Defendant	10	%
Total	100	%

(Note, the percentages above must total 100%).

Interrogatory No. 5:

In terms of dollars, *without* reducing this damage figure by any percentage of negligence of which you may have found plaintiff guilty, how much in total damages did the plaintiff sustain as a result of the accident?

a) Injury, pain, disability, disfigurement, loss of capacity for enjoyment of life.

$150,000

b) Medical expenses.

$200,000

c) Lost earnings, lost earning capacity.

$279,000

(Fill in each blank with a dollar amount or with a "0" if you find no damages for a particular category).

Lake Charles, Louisiana this 22nd day of September, 1987.

/s/ Carol A. Hess

FOREPERSON

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICHARD, MICHAEL LYNN	*	
VERSUS	*	No. 86-0046
THE FIRESTONE TIRE & RUBBER CO.,	*	

[EXTRACT FROM COURT TRANSCRIPT JURY CHARGES]

In this case the Plaintiff, Michael Richard, claims damages for personal injuries alleged to have been caused by a defective condition in the multipiece rim manufactured by Firestone Tire and Rubber Company. Specifically, the Plaintiff alleges that while he was working on a tire and rim, which were to be remounted on a large diesel truck, the multipiece rim upon which the tire was mounted disengaged and struck the plaintiff. You are instructed as a matter of law that the plaintiff must establish by a preponderance of the evidence that the defendant has engaged in substandard conduct and is thus in legal terms at fault. In this case involving alleged damage from a product, the basic standard applicable to the manufacturer is: The manufacture of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who, without fault on his part, sustains an injury caused by a defect in the design, composition or manufacture of the product, if the injury might reasonably have been anticipated. The product may be defective in its design for any one of three reasons. First, that a reasonable person would conclude that the danger in fact, or risk of harm

posed by the design outweighs the benefits which flow from it. Second, even if the benefits which flow from the product outweigh the danger in fact, the manufacturer is liable if alternative products were available to serve the same needs with less risk of harm. Or third, if it were feasible to design the product with less harmful consequences, the manufacturer is liable. The plaintiff must establish by a preponderance of the evidence three essential elements in order to recover on this claim. First, that the product made by the defendant had a defect which existed at the time the defendant made it. Second, that the injury which the plaintiff suffered was in fact caused by the defect in the defendant's product and might reasonably have been anticipated. And third, that there was actual damage to the plaintiff's person. The first element of the plaintiff's case is that the product made by the defendant has a defect which existed at the time the defendant made it. When I use the word defect, I mean something more than a flaw or an imperfection. The law recognizes that manufacturers need not make a foolproof or accident proof product with no flaws whatsoever. Therefore, we use the word defect to describe some flaw that makes the product unreasonably dangerous when it is in normal use. Normal use is a manner of foreseeable use and may include something broader than operation exactly in accordance with the manufacturer's instructions. In determining whether danger or risk of harm is unreasonable, probability and magnitude of risk are to be balanced against the utility of the product. A product is defective or unreasonably dangerous when a reasonable seller would not sell the product if he knew of the risk involved, or if the risks are greater than a reasonable buyer would expect. Included within this rule is the principle that a product may be defective by a failure of a manufacturer to give warning. A manufacturer of a product must give warning of any danger inherent in a product made by it, or in its use of which it knows or should know in which the

user of the product would not ordinarily discover. The warning should be such that if followed it would make the product safe for users. To comply with this duty the manufacturer must give adequate warning, giving due consideration to the likelihood of an accident and the seriousness of the consequences from the failure to warn of any dangers that are inherent in and its use, or that may arise from improper handling or use of the product. In determining whether a manufacturer has fulfilled its duty to provide an adequate warning, a manufacturer is presumed to keep abreast of scientific knowledge, discovery and advances. However, the duty of the manufacturer to warn goes only to those dangers which are not obvious. A manufacturer is not compelled to warn knowledgeable users of the dangers of which they either know or should be aware. Also, a manufacturer can not be held liable for injuries caused by a defect where the defect was created by an alteration or change in the product that amounts to an intervening or superseding event. If you are convinced that the product was defective according to this definition, then the plaintiff need not prove any particular carelessness by the maker in its manufacturer. The manufacturer is presumed to know of the defects in the things he makes, whether or not he has actual knowledge of them. It is not necessary for plaintiff to prove the precise nature of the defect, only that a defect existed and caused the injure complained of. But in order to return a verdict for the plaintiff without proof of carelessness on the part of the maker of the product, you must be convinced by a preponderance of the evidence that the product was defective, that the risks inherent in the product were greater than the reasonable buyer would expect. As to the requirements that the plaintiff's injury be caused by the defendant's product. I don't mean that the law recognizes only one cause of any injury consisting of only one factor or thing or the conduct of only one person. On the contrary, many factors

or things may operate at the same time, either independently or together, to cause injury or damage. If you find a defect, you should resolve the question of causation by deciding whether the plaintiff would probably not have suffered the claimed injuries in the absence of the defect in the defendant's product. If the plaintiff probably would have suffered those injuries, regardless of the defect in the product, then you must conclude that the injuries were not caused by the defendant, and render a verdict for the defendant. If on the other hand, plaintiff probably would not have suffered the claimed injuries in the absence of the defect in the product, then you must conclude that the defect did play a part in the plaintiff's injury, and you must proceed to the next element of the plaintiff's case.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICHARD, MICHAEL LYNN	*	
VERSUS	*	No. 86-0046
THE FIRESTONE TIRE & RUBBER CO.,	*	

[EXTRACT FROM COURT TRANSCRIPT]

(WHEREUPON, THE JURY RETURNED TO THE COURTROOM, AFTER WHICH, THE FOLLOWING OCCURRED:

THE COURT: Okay, Ms. Hess, Y'all have reached a verdict?

MS. HESS: Yes, your honor, we have.

THE COURT: If you will hand it to the Marshall, please. All right. Ladies and gentlemen, I am going to let you retire for a minute longer and I will be right back with Y'all. All right?

WHEREUPON, THE JURY LEFT THE COURTROOM, AFTER WHICH, THE FOLLOWING OCCURRED:

THE COURT: Gentlemen, the verdict is improper. They answer one of the interrogatories yes. On interrogatory number one they answer one of

them yes and one of them no, out of the first one. And then they proceed to answer the rest of them. I will listen to suggestions before I do what I am going to do.

MR. HAMLIN: You don't want to tell us.

THE COURT: I will tell you what they did on the first one. They said, in answer to "A" they said yes. And in anwer to "B" they said no. And with "C" they said yes. All right, Mr. Hamlin, you are up.

MR. HAMLIN: Your honor, I think that's a defense verdict.

THE COURT: And?

MR. HAMLIN: According to your verdict form.

THE COURT: What do you suggest I do?

MR. HAMLIN: I would move to have a judgment entered in accordance with the verdict.

THE COURT: All right. Mr. Lundy, what's your suggestion?

MR. MASSEY: Your honor, if they answered the interrogatories on the next page yes, then it would seem to me that rather than being a defense verdict, it would in fact be a plaintiff's verdict.

THE COURT: And so you think I ought to accept this verdict and make of it what I can? Think about it, I will be back in a second.

(WHEREUPON, COURT WAS RECESSED FOR A SHORT PERIOD OF TIME AND THEN RETURNED AND THE FOLLOWING OCCURRED:

THE COURT: I am going in myself, I assume there are no objections? All right. I propose to go in there and tell them to re-read page one and follow that instruction at the bottom of the page. I will take your objection to that first.

MR. MASSEY: Your honor, I don't have any objections, but I would ask that one additional thing be told to the jury and that is that there verdict is inconsistent because they have not in fact followed the instruction that if they, if they put answer "B" No, that they should not.

THE COURT: I am just going to say you have not followed the instructions on page one. Please try to do so.

MR. HAMLIN: My objection is that.

THE COURT: Wait. Don't.

MR. MASSEY: My objection is that I think the court should fully explain how they have not followed the instruction.

THE COURT: It's plain as the nose on your faces down at the bottom.

MR. MASSEY: I think they obviously didn't understand.

THE COURT: I will underline "OR".

MR. MASSEY: I still would like to have a more elaborate instruction.

THE COURT: Well, tell me.

MR. MASSEY: I would like the jury to be told that by answering question "B" no, that they are thereby prohibited from going any further, and that they can not answer any questions on page 2, 3 or 4, once they have answered either "A" or "B".

THE COURT: Keep talking, I am listening.

MR. MASSEY: And that's my request.

THE COURT: I am going to write them a note, your verdict, as written, is not correct. Underline "NOT". Please note the directions at the bottom of page one. If your answer to "A" or, and I have underlined "OR" twice, "B" is no, you should not, underline "NOT", answer any other questions. If both are"YES" you should answer further as directed.

MR. MASSEY: I will go with that your honor.

THE COURT: All right.

MR. HAMLIN: I strongly object to that. Your note, by its very terms, implies that you disagree with the verdict. I, first of all, want to move for judgment in accordance with the verdict where the defense, a judgment for the defense

in accordance with the verdict. This jury has been out now for five and a half hours, has sent one note that indicated they didn't find a defect in the product. They have now returned a verdict that finds for the defendant. They have gone forward, they have gone beyond page one when they should not have. But in accordance with their answer to "B", it is a defense verdict. They have found that no injury, that the injury was not caused by a defective condition. And I think to further encourage them to deliberate, Judge, is asking them to come back with a plaintiff's verdict.

THE COURT: All right, sir.

MR. HAMLIN: Short of your agreeing with everthing I would just said I would ask that you do nothing more than say--

THE COURT: Frankly, I think it doesn't make any difference for me not to agree with you. I think whatever you have preserved you can still argue when it's over because I have made a true and correct copy of the thing as it now stands. And I will put it under seal in the record until after that jury leaves. And you may all look at what they first sent back.

MR. HAMLIN: All right, but further, in addition to what I have said, Judge, I think what you are going to say is highly prejudicial to me.

THE COURT: All right, so what do you want me to say?

MR. HAMLIN: In addition to what I have just said it seems to me like you need to simply call their attention to the bottom sentence on page one.

THE COURT: Your verdict as written is not correct in form.

MR. HAMLIN: Not proper in form.

THE COURT: In proper form.

MR. HAMLIN: The word correct is the word I would most strongly disagree with.

THE COURT: Your verdict is not in proper form.

MR. HAMLIN: Please refer to the sentence at the bottom of page one.

THE COURT: Your verdict, as written, is not in proper form. Please note, somebody stop me any time, the directions at the bottom of page one.

MR. HAMLIN: Stop.

MR. MASSEY: Continue.

THE COURT: No, I have to. If your answer to "A" or "B" is no, you should not answer any other questions.

MR. MASSEY: On the following pages.

MR. HAMLIN: Any further questions, period.

THE COURT: On the following pages, if both "A" and "B" are yes, you should continue as directed.

MR. HAMLIN: Judge, that last sentence is highly prejudicial.

THE COURT: You should continue as directed?

MR. HAMLIN: No, but you are suggesting that they ought to think about putting yes for "A" and "B". That's a strong suggestion from the court what in the world is necessary? This is a not a, this is an intelligent jury, Judge. You have a school teacher. They can read that last sentence just like I can. They don't need that last sentence from you. That suggests to them that the Court wants them to go back and reconsider number "B". No other way to read that kind of a note.

THE COURT: If your answer to "A" or "B" is no, you should not answer any of the other questions.

MR. HAMLIN: You don't need that sentence or the next one.

THE COURT: If both "A" and "B" are yes, you should continue as directed.

MR. HAMLIN: Why put either one of those, Judge? This is an intelligent jury.

THE COURT: I am going to do it. All right. Anything else?

MR. HAMLIN: My point is, Judge, you are suggesting that they change an answer. I think--

THE COURT: I am going to walk in there and say, I do not mean to suggest an answer to Y'all. No, I'm not. I am going to leave it just like this. Okay.

WHEREUPON, COURT WAS RECESSED FOR A SHORT PERIOD OF TIME AND THEN RETURNED AND THE FOLLOWING OCCURRED:

Supreme Court, U.S.
FILED
DEC 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-885

In The
Supreme Court of the United States
October Term, 1988

FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

versus

MICHAEL LYNN RICHARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the district judge was entitled to find the jury's answers to interrogatories inconsistent and retire the jury for further deliberations?

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No. 88-885

In The

Supreme Court of the United States

October Term, 1988

FIRESTONE TIRE & RUBBER COMPANY,

Petitioner,

versus

MICHAEL LYNN RICHARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Michael Lynn Richard, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed herein by The Firestone Tire & Rubber Company.

STATEMENT OF THE CASE

Plaintiff, Michael Lynn Richard, instituted this action against The Firestone Tire & Rubber Company to recover for serious injuries received when a multi-piece truck/tire rim assembly exploded under pressure. The multi-piece rim was designed and manufactured by defendant. Hardesty Tire Service, who paid workmen's compensation benefits, intervened.

At the conclusion of the trial, this matter was submitted to the jury on special interrogatories. The jury originally returned answers finding that the Firestone multi-piece rim was defective, that Firestone had failed to warn adequately of the dangers of the product and that Firestone was 10% at fault, but the jury found no causation (Petitioner's Appendix D, A-26 to A-29). The trial judge retired the jury for further deliberations due to the inconsistency between a finding that Firestone was partly at fault and finding no causation (Petitioner's Appendix F, A-38 to A-44). After further deliberations, the jury returned a verdict finding both plaintiff and defendant partly at fault and that such fault caused Michael Richard's injuries (Petitioner's Appendix E, A-30 to A-33).

The Fifth Circuit held that Fed.R.Civ.P. 49(a) allows resubmission of inconsistent special verdicts, and that the district judge did not err in determining that the jury answers were inconsistent and resubmitting the case to the jury. Firestone's application for rehearing was denied and the instant petition for certiorari was lodged with this Court.

———o———

SUMMARY OF ARGUMENT

The district judge did not err in concluding that the jury answers to special interrogatories were inconsistent by resubmitting the interrogatories to the jury for further deliberations.

ARGUMENT

The decision by the judge to retire the jury for further deliberations after it reached an inconsistent verdict did not infringe upon Firestone's right to trial by jury and was not contrary to prior decisions of the Supreme Court. Furthermore, the decision of the Fifth Circuit in this case does not conflict with decisions of other circuits, so there is no need to grant the writ in order to reconcile conflicting circuit decisions.

A. THE COURT OF APPEALS DECISION DOES NOT INFRINGE ON FIRESTONE'S RIGHT TO TRIAL BY JURY AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THE SUPREME COURT

The most important fact to consider in this case is that it was the jury, not the trial judge, which cured the inconsistency of the verdict through further deliberations. Firestone apparently believes that once the jury returned its initial inconsistent verdict, the trial judge should have found a way to reconcile the inconsistent verdict and should have directed a verdict in favor of Firestone. However, the trial judge could have just as easily reconciled the inconsistent verdict by finding in favor of Michael

Richard, since the jury found that the product was defective and apportioned Firestone's fault at 10%. In this hypothetical situation, regardless of which way the trial judge directed a verdict, the losing party would have asked the appellate court to reconcile the jury's verdict and the appellate court would then have had a duty to reconcile the verdict or remand the case for retrial. By advising the jury that the verdict, as written, was not in proper form, the trial judge relieved the appellate courts from the responsibility of reconciling the verdict and placed the responsibility of deciding the case where it belongs, in the hands of the jury. Since the jury made the decision, it is difficult to understand how Firestone can argue that it was deprived of its right to a jury trial. It would seem that if the judge had directed a verdict in favor of either party without requiring the jury to retire for further deliberation, the Seventh Amendment argument might have more substance.

In support of its argument Firestone relies heavily on cases which present an entirely different fact pattern, specifically with one critical difference. The cited cases speak of the obligation of the trial court to reconcile inconsistent verdicts *after the jury has been discharged.* When a jury which is *still empaneled* returns an inconsistent verdict ,the courts have uniformly allowed the trial court to resubmit the same or additional interrogatories, not only in cases of clear inconsistencies, but in cases of ambiguities as well. *Morrison v. Frito-Lay, Inc.*, 546 F.2d 154 (5th Cir. 1977); *Nance v. Gulf Oil Corp.*, 817 F.2d 1176 (5th Cir. 1987); *Guidry v. Kem Mfg. Co.*, 604 F.2d 320 (5th Cir. 1979), cert. den. 445 U.S. 929, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980).

The position that a trial court has the authority to resubmit ambiguous or unclear interrogatories to the jury for clarification is consistent with the spirit and the letter of the Seventh Amendment. When a jury is no longer available to clarify ambiguities, it cannot be questioned that the trial court and the appellate court should make every effort to ascertain the jury's true intent. However, when a jury is still available to clarify an ambiguity, the court should resubmit the interrogatories so that the true finding of the jury is obtained. This view is clearly consistent with, if not mandated, by the Seventh Amendment.

In *McLaughlin v. Fellows Gear Shaper Co.*, 786 F.2d 592 (3d Cir. 1986), the jury returned special interrogatories which were inconsistent. The court submitted additional interrogatories over objections of both counsel and the jury later returned a verdict for the plaintiff. On appeal the defense asserted that the district court was mandated by the Seventh Amendment to reconcile the inconsistencies. The Third Circuit held that there could be no Seventh Amendment violation when it was the jury rather than the trial judge which reconciled the inconsistencies.

The Fifth Circuit has consistently allowed resubmission of inconsistent jury verdicts. *Nance v. Gulf Oil Corp.*, supra; *Guidry v. Kem Mfg. Co.*, supra; *Morrison v. Frito-Lay, Inc.*, supra; *Griffin v. Matherne*, 471 F.2d 911 (5th Cir. 1973); *Landry v. Offshore Logistics, Inc.*, 544 F.2d 757 (5th Cir. 1977). Inherent in the concept of resubmission is that the court must find the true, unequivocal intent of the jury.

Firestone's reliance on *White v. Grinfas*, 809 F.2d 1157 (5th Cir. 1987), is difficult to understand. In that case the Fifth Circuit merely recognized the broad discretion of the trial court to refuse to consider interrogatories answered in violation of the judge's instructions. The *White* case certainly does not stand for the proposition that the trial court is prohibited from allowing a jury to engage in additional deliberations in order to correct an inconsistent verdict. The Fifth Circuit was not faced with that issue because the trial court did not resubmit the verdict to the jury.

Perricone v. Kansas City Southern Rwy., 704 F.2d 1376 (5th Cir. 1983), likewise does not support Firestone's contention. If anything, it supports that of Mr. Richard. In that case the jury returned a *consistent* verdict which found the plaintiff to be 70% at fault. The trial judge then told the jury that he had forgotten to instruct them that if they attributed more than 50% of the fault to the plaintiff, he could not recover. He then ordered them to reconsider their verdict. Naturally, the Fifth Circuit was troubled by the actions of the trial judge because of the potential coercion or undue influence. The same potential for coercion does not exist in the case at bar because the trial judge did not even remotely suggest what the effect of the jury's answer would be. The court merely instructed the jury to read the directions which were already on the printed jury verdict form. The trial judge recognized that the jury was in the best position to cure the inconsistency and exercised his discretion by resubmitting the interrogatories to the jury.

Finally, Rule 49 of the Federal Rules of Civil Procedure allows the trial court to resubmit interrogatories to the jury when the answers are inconsistent.

As to the contention of Firestone that the appellate court decision in this case conflicts with prior decisions of the Supreme Court, it must be pointed out that Firestone has not cited any Supreme Court decisions which are directly, or even indirectly, in conflict. The only Supreme Court cases cited were *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962), and *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963). It is true that both cases stand for the proposition that courts must search for a way to make the jury's answers to special interrogatories consistent. However, both cases dealt with situations in which the jury was released without ever being asked to engage in further deliberations to correct the ambiguity or inconsistency in the verdict. Neither case involves the fact situation in the case at bar, where a jury which was still empaneled was asked to deliberate further in order to cure an inconsistency.

Firestone got exactly what it complains not to have gotten, i.e., a right to trial by jury. Firestone is simply dissatisfied with the results and wants this court to say that the trial judge should have directed a verdict rather than allow the jury to engage in further deliberations. In essence, Firestone's argument is that by giving the problem to the jury to resolve, Firestone was denied a right to trial by jury. Firestone's argument is unsound and this Court is urged not to grant the writ of certiorari.

B. THE DECISION OF THE FIFTH CIRCUIT DOES NOT CONFLICT WITH OTHER CIRCUIT COURT DECISIONS

Firestone contends that *McCollum v. Stahl*, 579 F.2d 869 (4th Cir. 1978), conflicts with decisions in the Fifth Circuit and particularly the case under consideration. While it is true that the *McCollum* decision conflicts with cases decided in the Fifth Circuit in some respects, that fact alone should not persuade the Court to exercise its discretion to grant the writ. In *Stanton By Brooks v. Astra Pharmaceutical Products*, 718 F.2d 553 (3d Cir. 1983), the court approved the actions of the trial judge in asking the jury to engage in further deliberation to reconcile inconsistent answers. *Astra Pharmaceuticals* cited *McCollum v. Stahl* for the proposition that the court may not resubmit to a jury "questions propounded under Rule 49(a) of the Federal Rules of Civil Procedure. The Third Circuit observed that *McCollum v. Stahl* was the only case in existence which supported the plaintiff's position and further observed that *McCollum* relied on a Fifth Circuit decision which had been implicitly overruled in later Fifth Circuit decisions. In approving the actions of the trial judge the Third Circuit held:

> "Moreover, in purely pragmatic terms, it seems terribly inefficient not to obtain clarification from a still-empaneled jury of the meaning of its answers and verdict, especially when we consider that unclarified inconsistent answers often necessitate a retrial of the entire case. Accordingly, we hold that the district court did not abuse its discretion resubmitting the 'special questions' to the jury, whether those questions be deemed to have been propounded under Rule 49(a) or 49(b)." *Stanton By Brooks*, 718 F.2d at 575.

In the instant case, the trial judge adopted the common sense view of Federal Rule 49 and allowed the jury to clarify the inconsistent verdict. The fact that there exists a single case in the Fourth Circuit which does not support the actions of the trial judge in this case does not provide a sufficient reason for the issuance of the writ. The issue is one of relatively minor importance and it is respectfully submitted that every other circuit court in this nation would have reached a similar result. In fact, given the facts of this case, the Fourth Circuit Court of Appeals would probably refuse to follow the *McCollum v. Stahl* decision because there was no denial of Firestone's right to trial by jury.

Firestone's contention that the initial jury verdict was a decisive verdict for the defendant is without merit. In the first verdict the jury found no causation but that the product was defective, that Firestone was 10% at fault, and that the plaintiff's damages were $629,000. After the verdict was rendered, counsel for Firestone argued that it was a defense verdict while counsel for Richard argued that it was a plaintiff's verdict. The trial judge easily recognized the inconsistency and took the only fair and equitable approach to the problem. He resubmitted the interrogatories and asked the jury to please read the instructions on the verdict form. When the jury retired, they made no change in the interrogatories concerning defect, percentage of fault or damages. The only change was in the interrogatory concerning causation and that interrogatory was probably misunderstood by the jury from the very beginning. Thus, if the trial judge had granted Firestone's motion and not resubmitted the interrogatories to the jury, it would have been the task

of the appellate courts to somehow reconcile the inconsistency and the case would have ultimately been remanded for a new trial.

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CONCLUSION

The right of the litigants in this case to a trial by jury was saved from infringement by the decision of the trial court to resubmit inconsistent answers to interrogatories. Upon resubmission the jury clarified the inconsistency in its verdict, thereby relieving the parties from having to retry the case at a future date. The actions of the trial judge were authorized by the Federal Rules of Civil Procedure and by prior federal jurisprudence.

Respectfully submitted,

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